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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-1561

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ELECTRO VECTOR, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Michael P. Merrill, on behalf of the Respondent, Electro Vector, Inc., hereby submits its Brief in opposition to the Solicitor General's request for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

The statement of the Opinions Below, Jurisdiction of this Court and the Statute Involved as set forth in the Petition for Writ of Certiorari submitted herein are correct.

QUESTIONS PRESENTED

1. Whether or not Section 10(e) of the National Labor Relations Act requires the Board's findings to

be sustained on appeal if the lack of certain evidence was not timely objected to by the responding party before the Board, its member agent or agency.

2. Whether the Ninth Circuit Court of Appeals erred in concluding that the bonus was not a term or condition of employment within the meaning of Section 8(a)(3) of the Act as a prerequisite of finding the Respondent in violation of that Section.

3. Whether, irrespective of said bonus being a condition of employment, there is substantial evidence that the Respondent violated Section 8(a)(3) and (1) by failing to pay the stated bonus to permanently replaced strikers.

STATEMENT OF THE CASE

The underlying facts of this case as indicated by the exhibits on file herein and the transcript are primarily undisputed. On May 2, 1974, the Union initiated an economic strike in support of collective bargaining demand. Initially, all of the production and maintenance employees of the Employer participated in said strike. (Tr. 10, 11).[1] On May 6, 1974, the Employer sent a letter to all striking employees requesting that they return to work by May 13, 1974, or that suitable replacements would be sought for their positions. (GC Ex. 7, Tr. 31, 32). As replacements were hired for appropriate positions, the striking employees were sent a second letter informing them of the replacement and their status as a replaced employee. (GC Ex. 88, Tr. 32, 33). On November 27, 1974, the Employer paid a bonus. (Tr. 24). This bonus was paid to all employees who (1) were actively working for the Company on that day, and (2) who were actively working for the Company at the end of the Company's fiscal year. (Tr. 17, 23, 29, 30, 37). The term "actively working" meant present at the Employer's place of business and actually working at that time. Notably, these criteria were uniformly applied to employees whether they were returning employees who had participated in the strike or not. Those employees who were working at the end of the fiscal year but who were not working on the date the bonus was paid as well as those employees who were on strike at the close of the fiscal year but returned prior to the payment date were not paid a bonus. (Tr. 19, 24).

This bonus was in no way an accrued benefit automatically paid to the employee. (Tr. 22). Further, it was not a set Company program to pay bonuses and, in fact, payment was in no way mandatory. (Tr. 18, 29, 30). The bonus was not a part of the expired collective bargaining agreement between the Employer and Union nor was there any written policy in existence as to that bonus with a computation thereof. (Tr. 22, 28, 30). To the contrary, the payment of the bonus was not necessarily tied to profits; rather, it was fully a matter of discretion with the Company and a decision which rested primarily with

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[1]References are to the transcript of the hearing before the Administrative Law Judge on March 4, 1975.

the owners after an annual audit of the Company's books. (Tr. 35, 37).

The bonus was computed at a base amount of $150.00. More was paid to supervisors, lead men, and others who showed exceptional merit. A percentage less than $150.00 was paid to others based on their over-all attendance for the past fiscal year. (Tr. 19, 28). The bonus was paid as part of a regular payroll check. (Tr. 41). Precisely the same format for computation and payment was followed as that utilized in fiscal year 1973 which was the first year any monetary bonuses were paid. Prior to that time, turkeys and other gifts in kind were given as bonuses for the precise same purposes. (Tr. 29, 41). The stated basis of paying this monetary bonus was primarily a "humanistic" one due to the economic hardships which the employees were suffering under in fiscal year 1973 in addition to the Company's desire to keep attendance at an optimum. (Tr. 36).

At the time the bonus was paid, over one-third of the striking employees had already abandoned the strike and returned to work for the Employer. (Tr. 40). The record shows no promise of payments to returning strikers or replacement of strikers still supporting the work stoppage. (Tr. 24, 25, 31). At the time of the computation and granting of the bonus, there was no expectation that the employees then on strike would return to work for the Employer. (Tr. 39, 40). The testimony of employees still on strike indicated that there were no negative effects caused by the granting of this bonus. (Tr. 7 through 15).

ARGUMENT

A. SECTION 10(e) OF THE NATIONAL LABOR RELATIONS ACT REQUIRES THE BOARD'S FINDINGS TO BE SUSTAINED ON APPEAL ONLY IF SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD CONSIDERED AS A WHOLE, EXCLUSIVE OF WHETHER OR NOT THAT LACK OF EVIDENCE WAS OBJECTED TO BY THE RESPONDING PARTY BEFORE THE BOARD, ITS MEMBER AGENT OR AGENCY.

As indicated by the Board in its petition, Section 10(e) of the Act provides as follows:

> "No objection that has not been urged before the Board, its member agent or agency shall be considered by the Court, unless the failure or neglect to urge such objection will be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . ."

The Ninth Circuit Court of Appeals in *NLRB v. Selvin*, 527 F.2d 1273 (C.A. 9, 1975) has indicated that the limitation that objections to the Board's application for enforcement must be urged before the Board previous to being considered by the Court is independent from the question of whether or not the Board patently travelled outside the orbit of its authority. It is Respondent's contention that *Selvin* stands for the proposition that the Board's factual findings will be sustained on appeal only if supported by substantial evidence in the record considered as a whole; regardless of whether or not previous objection has been made to lack of substantial evidence in a particular area before the Board or any of its agencies.

The foregoing analysis would appear to be consistent with the language in *NLRB v. Red Spot Electric Company,* 191 F.2d 697 (C.A. 9, 1951). In that case, the Board had moved for summary entry of decree of enforcement of a Board order automatically, without examination, inasmuch as the Respondent had not filed exceptions to the Board's previous decision and had not made an appearance before the Court. Although the Ninth Circuit Court of Appeals did eventually enforce the Board's order, it rejected automatic enforcement, stating *inter alia* that it is the custom of the courts to take notice of manifest error to which no exception has been made, quoting from *NLRB v. Cheney California Lumber Company,* 327 U.S. 385 (1946):

> "Since the Court is ordering entry of a decree, it need not render such a decree if the Board has patently travelled outside the orbit of its authority so that legally speaking there is no order to enforce." (*NLRB v. Cheney,* 327 U.S. 385, 387.)

The leading Supreme Court cases in this area are *NLRB v. Cheney California Lumber Company,* 327 U.S. 385 (1946) and *NLRB v. Ochoa Fertilizer Corporation,* 368 U.S. 318 (1961). It is significant to note that in both of those cases, the respondent employers had not taken exception to the hearing officer's decision, nor had they made an appearance in the Circuit Court of Appeals in which the Board was seeking enforcement of the order.

In *Cheney,* this Court noted that there had been no previous objection made to interstate commerce

requirements or actual violation of the National Labor Relations Act. Both of these areas do not relate to questions of substantial evidence, but are rather basic requirements for jurisdiction by the Board. In *Ochoa,* the Court *sua sponte* deleted certain terms of a cease and desist order which had actually been consented to by the parties. This Court in that case emphasized the importance of a consent by both parties in reversing the First Circuit Court of Appeals:

> "Contrary to the Court of Appeals, we think that consent makes a significant difference; it relieves the Board of the very necessity of making a supporting record. A decree rendered by consent 'is always affirmed without considering the merits of the cause'. *Nashville C of ST L.R. Company v. U.S.,* 113 U.S. 261."

Furthermore, this case again concerned critical statutory or jurisdictional language as opposed to consideration of substantial evidence.

Conversely, in the instant case, we are concerned only with the issue of substantial evidence. Additionally, the Respondent Company, Electro Vector, Inc., did file exceptions to the administrative law judge's conclusion of law that it had engaged in unfair labor practices within Section 8(a)(1) and (3) of the National Labor Relations Act by disqualifying strikers from bonuses, thereby discriminating against employees with regard to their hours and conditions of employment. Respondent in this case has also made an appearance before the Ninth Circuit Court of Appeals supporting its position both factually and

legally. As to the factual issue of whether or not the bonus was in fact a term or condition of employment, the Respondent has steadfastly maintained that this bonus was clearly a matter of discretion with the Company.

Effectively, the Respondent's filing of exceptions in this matter and their appearance in this case has placed the burden upon the Board to support its order as to questions of fact by substantial evidence on the record, which requires a showing that the employer has discriminated against employees with respect to a term or condition of employment. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 30 (1967); *E. I. DuPont DeNemours & Company v. NLRB*, 480 F.2d 1245, 1248 (5th Cir. 1973). Inclusion in the record of uncontroverted evidence that the bonus paid was purely a discretionary one in this case raises the issue *de facto*. Its importance is buttressed by its mention in the employer's brief supporting its objections to the National Labor Relations Board and in its brief before the Ninth Circuit Court of Appeals. Failure of counsel to mention the precedent case of *NLRB v. Pistoresi, Nello & Son, Inc.*, 500 F.2d 399 (C.A. 9, 1974) did not require the Ninth Circuit Court of Appeals to ignore the existence of that case.

B. THE NINTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT THE CASH BONUS FOR WORK PREVIOUSLY PERFORMED HEREIN WAS NOT A TERM OR CONDITION OF EMPLOYMENT WITHIN THE MEANING OF SECTION 8(a)(3) OF THE ACT.

The Court of Appeals properly interpreted the record below in determining that the bonus in question did not in fact amount to a condition of employment. Reviewing the evidence in the record, the Court indicated that prior to 1973 the Company did not have a bonus program. In 1973 the Company did in fact pay a bonus but it did not establish an official program of bonuses. The accountant for Electro Vector, Inc., indicated that this bonus was never automatically given. The Vice President and General Manager of Electro Vector, Inc., further testified that the giving of a bonus was not mandatory but was at the discretion of the owner of the Company. It is important to note further that this bonus was not part of the Union contract which was in existence at the time of the controversy. The above evidence was unrefuted by any witnesses or documentary evidence to the contrary.

The Court of Appeals properly determined that in order to find employer discrimination with respect to a term or condition of employment, the benefit being conferred by the employer must in fact be "a term or condition of employment." *NLRB v. Great Dane Trailers, Inc., supra; E. I. DuPont DeNemours & Company v. NLRB, supra.* A bonus may in fact be a wage in some circumstances and in other circumstances be considered to be a gift. Bonuses should

properly be considered gifts unless they have been paid over a sufficient length of time to have become a reasonable expectation of the employees and, therefore, to be a part of their anticipated remuneration. *Century Electric Motor Company v. NLRB,* 447 F.2d 10 (8th Cir. 1971); *NLRB v. Harrah's Club,* 403 F.2d 865 (9th Cir. 1968); *NLRB v. Electric Steam Radiator Corporation,* 321 F.2d 733 (6th Cir. 1963); *NLRB v. Pistoresi, Nello & Son, Inc.,* 500 F.2d 399 (9th Cir. 1974).

C. EVEN IF THE BONUS IS CONCLUDED TO BE A CONDITION OF EMPLOYMENT WITHIN THE MEANING OF SECTION 8(a)(3) OF THE ACT, THERE IS NO SUBSTANTIAL EVIDENCE THAT THE RESPONDENT VIOLATED THE ACT BY FAILING TO PAY DISCRETIONARY BONUSES TO PERMANENTLY REPLACED STRIKERS.

The leading case in this area is the *NLRB v. Great Dane Trailers, Inc., supra,* wherein this Court held that the Court of Appeals below erred in speculating as to the motives of the Employer/Company. In that case, accrued vacation benefits under an expired Union contract were summarily denied to strikers. The record was entirely devoid of the Company's motivation in denying such benefits to the strikers and this Court held that the Court of Appeals could not speculate as to what the Employer's motives were in such a denial, specifying the applicable rule of law as follows:

> "From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can be reasonably concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the Employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight' an anti-union motivation must be proved to sustain the charge if the Employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the Employer engaged in discriminatory conduct which could have adversely affected the employee rights to some extent, the burden is upon the Employer to establish that he was motivated by legitimate objective since proof of motivation is most accessible to him."

Essentially, the *Great Dane Trailers, Inc.* case is one that sets forth the various burdens of proof. On one hand, if it is reasonably concluded that an Employer's discriminatory conduct is inherently destructive of important employee rights, then the Board need not prove any further anti-union motivation. On the other hand, if the Board shows discriminatory conduct which is comparatively slight, then anti-union motivation must be proved to sustain the charge. In this second instance, the Employer must first place on the record proof of a legitimate and substantial justification for his conduct. Once the Employer's motivations other than anti-union are placed on the record, it then becomes the Board's burden to rebut

these business justifications and prove a case of anti-union motivation. It is important to note that in the case of alleged discriminatory action which results in a comparatively slight effect on employee rights that the National Labor Relations Board must prove the anti-union motivation in order to legitimately find a violation of the act.

Apart from the controlling precedent with regard to burdens of proof and legal presumptions, the *Great Dane Trailers, Inc.*, case, *supra*, has been cited as factual precedent in subsequent accrued benefits cases. *NLRB v. Frick Co.*, 397 F.2d 956 (C.A. 3, 1968); *NLRB v. Duncan Foundry and Machine Works, Inc.*, 435 F.2d 612 (C.A. 7, 1970); *Tex-Tan Welhausen Co. Inc. v. NLRB*, 419 F.2d 1265 (C.A. 5, 1969). As in *Great Dane Trailers, Inc., supra*, each of the foregoing cases involved the denial of accrued vacation benefits as set forth in prior existing union contracts which had expired prior to the commencement of strike activity. Notably, the additional cases cited by general counsel in support of the Board's contentions herein also involved accrued vacation benefits. *Cavalier Division of Seeburg Corporation*, 192 NLRB 290 (1971); *Allied Industrial Workers, AFL-CIO, Local Union No. 289 v. NLRB*, 476 F.2d 868 (1973); *NLRB v. Jemco*, 465 F.2d 1148 (C.A. 6, 1972), *cert. denied*, 409 U.S. 1109.

The controlling Board precedent which was applied in this case both by the administrative law judge and the Board itself was the National Labor Relations Board case of *Quality Castings Company*, 139 NLRB 928. That case involved the distribution under a

profit sharing plan. Each employee to qualify had to have worked fifty percent of the time between January and September preceding distribution. The amounts paid to those qualifying were a function of absenteeism, exceptions being allowed for excused absences. Some 64 employees struck in April and May of that year and were not thereafter recalled for valid economic reasons. Because of this, these striking employees were deemed not to have satisfied the qualifying criteria and were denied any distributions under the profit sharing plan. The National Labor Relations Board found that the disqualified strikers had been discriminated against in violation of Section 8(a)(3) and (1) on the basis that time on strike may not be lawfully considered the equivalent of normal absence for the purposes of determining a forfeiture. The Board specifically stated:

> "The Respondent cannot be required to make distributions to individuals for the period they were absent on strike. Neither, however, can the Respondent state that strike time is merely another form of absence equating it to other forms of absence discouraged by it and then proceed to impose a total nonproportionate forfeiture on employees because they engaged in such absences—in effect because they are engaged in Section 7 Activities."

The reasoning of the *Quality Castings Company* case which is the leading Board precedent has not been accepted by the Circuit Courts of Appeals in total. In fact, the *Quality Castings Company* case was reversed by the Court of Appeals for the Sixth Circuit. *NLRB v. Quality Castings Company*, 325

F.2d 36 (C.A. 6, 1963). In that opinion, the Court of Appeals quoted in length from this Court's opinion in *Radio Officers' Union v. NLRB,* 347 U.S. 17, stating as follows:

> "The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus, this section does not outlaw all encouragement or discouragement of membership in labor organizations. Only such as is accomplished by dscrimination is prohibited. Nor does this section outlaw discrimination in employment as such. Only such discrimination as encourages or discourages membership in a labor organization is proscribed."

This Court in that case went on to state:

> "We are of the opinion that when as in this case an Employer's action is not specifically directed against those who have engaged in protected types of union activity but is rather *directed at a group which is defined by other than union membership or activity criteria and which clearly includes others who did not engage in the protected concerted activities. The Board not only must prove discrimination but also it must prove the Employer's motivation.* There is nothing in *NLRB v. Erie Registor Corporation,* 373 U.S. 221 (1963), which conflicts with this holding." (Emphasis added).

The specific precedent set forth in the Ninth Circuit Court of Appeals has been similar to that of the Sixth Circuit in its refusal to enforce Board orders in such cases. In the case of *Pittsburgh-Des Moines Steel Company v. NLRB,* 284 F.2d 74 (C.A. 9, 1960), the Employer's petition to set aside the order of the

Board was granted. In that case, the Employer had denied a bonus to said workers of a plant because of their failure to achieve sufficient productivity to satisfy the demands of the Company's bonus formula. The lack of productivity was clearly the consequence of a strike carried on by the employees. The rationale in that case was as follows:

> "That protected union activity is the direct cause of a business condition upon which an Employer actually predicates discrimination among his employees does not mean that the basis for discrimination is the protected union activity. An employer may hire permanent replacements for economic strikers even though the business condition—and a lack of manpower—which impels the Employer to act was directly caused by a strike . . . indicates that when in order to obtain replacements for economic strikers it is necessary for an employer to promise seniority to the replacements, the denial of seniority status to those strikers who are reinstated, is not an unfair labor practice although the business condition which actuated the Employer to deny seniority status to reinstated strikers was directly caused by the strike itself and in Local 200 *International Brotherhood of Teamsters v. NLRB,* 233 F.2d 233, 238 (7th Circuit 1956) the court approved a conclusion of the Board which held that Employer had not committed an unfair labor practice by discharging an employee because the demand for his job had ceased even though the job was rendered unnecessary by the employee's own picketing. The picketing, a protected union activity, had caused business to drop off with the result that the Employer no longer had any need for the job which the employee had been doing."

The Ninth Circuit Court of Appeals further indicated that frequently the very business condition upon which the Employer has predicated the alleged discriminatory action is the direct result of participation in protected union activity and in this specific case the particular poor productivity of the group which did not receive the bonus was in fact caused by their participation in a prolonged strike during the year in question. Effectively, the strike had caused the business condition which the Employer then used as the criteria for its determination to withhold the bonus. The important point was that the protected Union activity was not in itself the basis of the Employer's discrimination. The Court then concluded that to enforce the Board's order they must find in the records substantial evidence of the bad motive or intent which underlay the Company's action other than the discriminatory act itself and its foreseeable consequences.

In *NLRB v. Federal-Mogul-Bower Bearings, Inc., National Seal Division,* 336 F.2d 781 (C.A. 9, 1964), the Employer terminated several employees who had not completed their sixty day probation period and who had incidentally participated in a strike. The case was heard upon stipulated facts indicating no anti-union animus by the Employer. In that case, it was indicated that the Board is bound to first consider the effect of the Employer's rule or conduct on the rights of the employee to strike and secondly, the Board must consider the claimed business purpose of the Employer in promulgating the rule or adopting the course of conduct in issue; and further, that

upon a balance in favor of one side or the other being struck, that evidence concerning the motivation of the Employer would become an important element. The Ninth Circuit Court of Appeals went on to hold in *NLRB v. Federal-Mogul-Bower Bearings, Inc., supra,* that the record considered as a whole was barren of substantial evidence to sustain the Board's finding of unfair labor practices by the Respondent Company.

The foregoing cases, to wit: *NLRB v. Quality Castings Company; NLRB v. Federal-Mogul-Bower Bearings, Inc.,* and *Pittsburgh-Des Moines Steel Company v. NLRB, supra,* admittedly predate the Supreme Court's decision in *NLRB v. Great Dane Trailers, Inc., supra.* Notwithstanding this fact, the *Great Dane Trailers, Inc.,* case does not specifically overrule the precedent set in these foregoing cases but merely states a new approach with regard to setting forth certain presumptions and burdens of proof to be borne by the National Labor Relations Board and the respective Employer. In the specific matter of facts which give rise to an unfair labor practice in the alleged discriminatory denial of employee benefits, the Federal Courts have never expanded the Board's *Quality Castings* doctrine beyond that of the denial of accrued vacation benefits which had previously been provided for by an expired union contract.

In the case of *NLRB v. Duncan Foundry and Machine Works, Inc., supra,* the Ninth Circuit Court of Appeals specifically distinguished the *Pittsburgh-Des Moines Steel* case, *supra,* as not controlling in that particular situation because it dealt with a pro-

duction bonus as opposed to a question of accrued vacation benefits under an expired union contract.

Applying the foregoing legal principles to the instant case, it is the Employer's contention that the payment of discretionary bonus in the manner set forth by established company policy did not constitute a violation of the National Labor Relations Act. In the language of the *Great Dane Trailers, Inc.,* case, the action of the Employer in this case is clearly not that which can be described as inherently destructive of employee rights. This bonus was (1) a purely discretionary act on the part of the Employer; (2) totally unannounced to any employees including strikers or non-strikers; (3) took place after the majority of strikers had either been permanently replaced or had abandoned the strike and returned to work; (4) not viewed as having a substantial impact on the employees which were still on strike according to both their testimony and that of the Employer's representatives. This fact is buttressed by the finding of the administrative law judge and the Board that the particular act charged herein did not constitute a serious enough violation to convert the economic strike which was in progress to an unfair labor practice strike.

The instant situation is one where the Employer is presumed to have granted the bonus as a discriminatory act absent any evidence on the record to the contrary. However, the record is not void of the Employer's motivation. Representatives of the Employer have specifically testified that the motivation behind granting such a bonus was based on humanitarian desires as well as encouraging good attendance.

Once this evidence of a substantial business interest has been placed on the record, it is then the duty of the Board to show controverting evidence of anti-union animus. In this case, there is virtually no evidence of anti-union animus other than the alleged discriminatory action of granting the bonus itself.

Further, unlike the cases of *Great Dane Trailers, Inc.; Frick Company; Duncan Foundry and Machine Works* and *Tex-Tan Welhausen,* there was no entitlement to benefits set forth in any pre-existing contract nor was there any entitlement to a bonus at all for the year 1974 unless the Employer deemed it appropriate.

CONCLUSION

To summarize, the Ninth Circuit Court of Appeals was correct in holding, in line with its precedent, that the bonus paid was not a condition of employment; and even if this Court found to the contrary, the facts still fail to produce the substantial evidence required for enforcement of a Board order. In any case, Section 10(e) does not vitiate the traditional requirement that the Board's findings may only be supported by substantial evidence.

Accordingly, the Petition for Writ of Certiorari should be denied.

Dated, June 1, 1977.

Respectfully submitted,
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